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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 315

THOMAS PLUMERI and
FIRST NATIONAL KOSHER PROVISIONS, INC.,
Petitioners,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term, 1969

No.

THOMAS PLUMERI and
FIRST NATIONAL KOSHER PROVISIONS, INC.,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Thomas Plumeri and First National Kosher Provisions, Inc. ("First National"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 27, 1970.

Opinion Below

The United States Court of Appeals for the Second Circuit affirmed the judgment entered against petitioners in the United States District Court for the Southern District of New York. This opinion of the Court of Appeals has not yet been officially reported; a copy thereof is appended to this petition as Appendix A.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 27, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Did a "trial by computer"—the Government's offering in evidence, without prior notice to the defense, computer print-outs as to essential facts in issue and the District Court's refusing the defense access to the specially prepared program by which the computer arrived at its conclusions—violate Petitioners' rights under the Fifth and Sixth Amendments to due process and to confrontation and did this constitute a violation of the Jencks Act, 18 U.S.C. 3500.

2. Whether Petitioners' Fifth and Sixth Amendment rights to due process and to confrontation were violated when the District Court permitted two unsworn prosecutors to advise the jury as to the fact that they had a private conversation with a key prosecution witness and as to the prejudicial content of that conversation.

3. Whether the District Court's instruction that Plumeri's testimony was to be considered in light of his interest in the outcome of the case constitutes prejudicial error in violation of 18 U.S.C. § 3481 and due process standards.

4. Whether the District Court committed prejudicial error by charging the jury that Plumeri's conviction in 1960 for possessing policy slips may be considered in appraising his credibility.

5. Whether the District Court erred in preventing Plumeri from directly denying the charges of the indictment and then by casting doubt on the effect of such testimony.

6. Whether Petitioners were unduly prejudiced by the District Court's denial of defense motions that an alias of a codefendant who had been notoriously and disparagingly publicized under that alias be stricken from the indictment and not used at trial.

Constitutional Provisions and Statutes Involved

This case involves the Fifth Amendment (due process of law) and the Sixth Amendment (right to impartial jury and to confrontation with witnesses) of the United States Constitution.

The federal statutory provisions involved are: 18 U.S.C. § 152 (bankruptcy fraud), 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 3481 (competency of accused as witness) and 18 U.S.C. § 3500 (Jencks Act—production of statements and reports of government witnesses). These constitutional provisions and statutes are reproduced in Appendix B, *infra*.

Statement of the Case

Petitioners were convicted of the substantive crimes of fraudulently transferring and concealing the property of a bankrupt in contemplation of bankruptcy, and of fraudulently concealing the bankrupt's assets from the trustee in bankruptcy in violation of 18 U.S.C. 152, and of participation in a conspiracy to do the same in violation of 18 U.S.C.

371. Thomas Plumeri was sentenced to imprisonment for three years. First National Kosher Provisions, Inc. was fined $10,000.

There is pending before the Court a petition for certiorari on behalf of defendant John Dioguardi. Petitioners hereby adopt the Statement of the Case in the aforesaid Dioguardi petition. Nothing further in this regard need be noted here except to emphasize that petitioner Plumeri was the only defendant to testify, and that his testimony on behalf of himself and the other codefendants raised substantial issues of fact for the jury.

REASONS FOR GRANTING THE WRIT

POINT I

Without prior notice to the defense, the Government offered in evidence computer print-outs as to essential facts in issue, and the District Court refused the defense access to the specially prepared program by which the computer arrived at its conclusions. Such "Trial by Computer" violated petitioners' rights under the Fifth and Sixth Amendments to due process and to confrontation by depriving them of the right of effective cross-examination and constituted a violation of the Jencks Act (18 U.S.C. § 3500).

The Government's theory was that First National used far more of the inventory of Consumers Kosher Provisions Inc. ("Consumers") than it paid for. To support this theory, the Government introduced in evidence certain computer print-outs, specially prepared for this litigation, which purported to show, on a week-to-week basis, the use made by First National of the inventory of Consumers.

These sheets were introduced in evidence, over strenuous defense objection, without prior notice to the defense. The District Court denied the defense access to the specially prepared program by which this computer arrived at its conclusions. This case thus presents a unique issue of first impression as to the use in evidence of computer produced conclusions for the purpose of proving guilt in a criminal case.

In order to introduce these computer print-outs in evidence, the Government called as a witness one Maurice F. Row, who is in charge of the computer department of the F.B.I.

After providing an impressive recitation of his background in the use of computers (R. 1425-1427), Row testified that the FBI owned two IBM 360, Model 40 computers, each having a capacity to store 256,000 characters of information (R. 1428).

His department was given First National's numerous delivery slips, and the weight information from each of these slips was recorded on IBM tabulating cards—a separate card for each slip (R. 1428). The same was done for the information on the Government Exhibit 10 series, which was the alleged inventory sheets of American Kosher Provisions ("American").

A series of programs were then written for the computer, each program telling the computer to arrive at different items of information after examining the tabulation cards. The accuracy of the print-outs, thus produced, depended upon the correctness of the program,* as well as the correctness of the information recorded on the tabulation cards. The person responsible for the creation of these

* The program was based on information furnished to Row by FBI Special Agent Frederick Lonergan (R. 1432-1452).

materials was "a technician," someone other than Mr. Row, who was not identified (R. 1434, 1450-1451, 1453, 1455). Defense demands for the production of the computer programs under 18 U.S.C. § 3500 were denied by the Court, as were motions that Row's testimony and the computer print-outs be stricken (R. 1429-1430, 1457, 1459).

Following the various specially prepared programs, the computer examined the numerous IBM tabulation cards and produced the following print-outs which were received in evidence over objection:

Gov. Ex. 42: A listing, segregated by product, date and invoice, showing the sales which had been made by First National (R.1433-1434).

Gov. Ex. 43: A summary, by day and week, showing First National's sales (R.1435).

Gov. Ex. 44: A calculation, using the Gov. Ex. 10 series, of the daily sales for each day (R.1436-1437).

Gov. Ex. 45: A calculation, showing, for each day, the inventory balance, the raw materials purchased, the sales of finished products, and the balance of initial inventory remaining each day. According to this exhibit, the total poundage of inventory, alleged to have been returned to Consumers, was exhausted by First National on November 5, 1964 (R.1437-1438).

The defense asked Row whether it was "true that what you have done here has come up with probabilities?" (R. 1439). The Government's objection was improperly sustained. Then the defense asked Row whether the results shown on Exhibits 42-45 are "accurate reflections of the conditions which existed in the business of First National Kosher Provisions during the periods shown by these ex-

hibits?" (R. 1439). Again, the Government's objection was improperly sustained.

When the defense asked Row whether he was furnished with the formula basis on which the products were manufactured with respect to the percentage of ingredients in such products, he answered: "No, sir" (R. 1445). Row was then asked whether if he had that information it would change the results he had arrived at, and once again, the Government's objection was improperly sustained.

Exhibit 45 was based upon the "assumption" of first in, first out (R. 1460). When the defense asked whether if the actual distribution was not made on a first in, first out basis, Row's computation would be "all haywire," the Government's objection was improperly sustained (R. 1461).

On cross-examination, Row admitted that the computer print-outs did not take into consideration any information concerning returns, or spoilage, or weight increases sustained by the raw meat during manufacture by the addition of other ingredients (R. 1442-1443).

The Government itself emphasized the importance of Row's testimony in the presence of the jury. When the defense objected to Row's testimony, the Government said:

> "This man will add a substantial portion to the government's case. He will tell us when the inventory was exhausted item by item, the original inventory which was returned, and he will tell us what day that was exhausted" (R. 1430).

Further, in his summation to the jury, the prosecutor argued:

> "The study that was made by the FBI computer shows clearly that they were selling a lot more stuff

than they were able to produce even with the machinery of Consumers. There were selling a lot of it. It was rolling out of there to Consumers' customers" (R. 3463).

* * * * *

"The FBI computer sheet shows that all the finished product which existed at the time, 25,569 and a half pounds, was exhausted by November 6th of 1964, working that study on the basis, as Mr. Thomas Plumeri said, in the meat industry, the first in is the first out". (R. 3467).

Row was the last witness of the day. Immediately upon the resumption of proceedings the following morning, the defense again moved for the production of the computer programs pursuant to 18 U.S.C. § 3500. The motion was again denied upon the ground that such a program is not a statement within the meaning of that statute (R. 1468-1474).

The defense then moved:

". . . to strike the testimony of the witness Row and Exhibits 42 through 45, inclusive [the computer print-outs] introduced on his testimony on the ground, among others, that this testimony is based upon hearsay evidence of a mechanical or an electronic computer which was not itself subject to cross-examination, thereby denying the defendant the constitutional right of confrontation and cross-examination, and to instruct the jury to disregard his testimony and the exhibits introduced thereunder."

The motion was denied by the Court (R. 1477).

The potential application of computers in the search for truth is manifest. However, since computers are created, operated and instructed by men, they are subject to the

same mistakes and can create the same misapprehensions which cross-examination is meant to expose.

Apart from the reliability of the process, the use of such highly sophisticated equipment may inordinately impress, if not overwhelm, a jury of laymen, and provide an undue aura of credibility to all of the evidence offered by the same side.

The only effective weapon with which the cross-examiner can test the computer proof is analysis of, and cross-examination concerning, the accuracy of the information and instructions given to the computer. In the present case, this tool of cross-examination was denied to the defense. Thus, the defense was unable to test the validity of the computer's results, or to cross-examine Row effectively, or to call its own expert to testify on the program prepared especially by the Government for this litigation, or to find the errors of human programmers. As in *United States* v. *Kelly*, 420 F. 2d 26 (2d Cir. 1969), "fairness requires that adequate notice be given the defense to check the findings and conclusions of the government's experts."

The result was that the defense was faced with the prospect of having to cross-examine a computer without the basis to do so. As Row admitted, the computer program written by the government is "a set of instructions telling the computer what to do with this data" (R. 1455).* Without obtaining this set of instructions, the defense could not test the accuracy of the computer print-outs. Row specifically said that the computer "will bring out exact results" "if it is correctly programmed" (R. 1451). A leading com-

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* See also 81 Harvard Law Review 1541, 1554 (May 1968).

mentator in this field has written of the conversion of computer records into legible form, as follows:

> ". . . tampering in the course of conversion very likely can be more easily concealed if people do the work. The computer program normally would reveal any such deception.[5]"

Footnote 5 of this commentator reads as follows:

> "This is not to suggest that the uncovering of tampering with computer records accomplished in the conversion process is a simple task. Lawyers probably will need the help of computer specialists in designing cross-examination or other inquiries into the matter and in selecting steps, such as verbatim dumps of the records, that might be useful for the purpose." *

It is clear that the use of the computer-produced evidence was a complete surprise to the defense. It is also clear that the defense persistently requested access to the underlying computer programs for use in cross-examination of the Government's computer expert, and that the trial court refused such access.

While acknowledging that the programs should have been supplied to the defense, the opinion of the Court of Appeals indulges in some tortuous reasoning to conclude that a new trial is not required. First, the opinion criticizes the defense for not adequately making known to the trial court the ground upon which such material should be furnished for cross-examination. Then, it overrules the initial

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* Freed, Roy N., "Inspection of Corporate Computer and Other Records Not Legible Visually—A Case Study on Legislating for Computer Technology, 23 *The Business Lawyer* 457 (January 1968). See also *Law and Computers in the Mid-Sixties* (1966, Joint Committee on Continuing Legal Education of the ALI—ABA).

defense contention, at trial, that the material was required to be produced under 18 U.S.C. § 3500. Finally, without specifically reaching the Sixth Amendment confrontation, cross-examination problem, it appears to sustain the Sixth Amendment motion made to the trial court, but holds the denial to have been harmless error within the context of this case.

It is clear that when the possible weak points of the computer process were revealed, the defense requested the opportunity to examine the computer programs for the purpose of cross-examining the expert. The expert was the last witness of the day. During his testimony, 18 U.S.C. § 3500 was the ground advanced for the production of the programs. Immediately upon the resumption of proceedings the following morning, the defense again moved for their production upon the same ground. When that was denied, the defense moved that the computer evidence be stricken upon the ground that it was hearsay evidence and violated "the constitutional right of confrontation and cross-examination" (R. 1477).

The defense could not have been more clear as to what was wanted and why it was wanted. Can a request under section 3500 be other than for reasons of cross-examination? Can a direct statement of the Sixth Amendment right of confrontation be other than the plain meaning of its words? Petitioners respectfully refer this Court to the testimony in question (R. 1425-1463, 1468-1474, 1477).

Without saying why, the Court of Appeals has held the defense argument for production under 18 U.S.C. § 3500 to be "wholly without merit" (44).

Although computer language would have no meaning to a layman, it was no less a statement than anything written in the English language, *i.e.*, it was a reduction of thought to symbols. The computer expert who testified at the trial had supervised the preparation of the written computer program; he authorized its use; and, by his testimony at trial, he attested to the truth of its contents (R. 1462-1463). How, then, did that program not fall within the following Section 3500 definition of "statement":

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement" 18 U.S.C. 3500 (e).

Admittedly, there is no case in point, and Congress did not make specific mention of computer language as a means of communication, but, then, it did not make reference to any particular type of language at all.

In noting that Section 3500 is not "the Magna Carta of the right to production," the Court of Appeals failed to take into consideration the mandatory nature of subsections (b) and (d) which require that such statements be delivered to the defense, or in the alternative, that the testimony of the witness be stricken, unless the more drastic remedy of a mistrial is required.

The violation of the requirements of that statute require a reversal of the convictions herein. *Campbell* v. *United*

States, 365 U.S. 85 (1961); *Killian* v. *United States*, 368 U.S. 231 (1961); *Campbell* v. *United States*, 373 U.S. 487 (1963).

It should be the burden of the prosecution to establish 1) that the computer was operating correctly, *i.e.*, that it did what it was told to do; and, 2) exactly what the computer was told to do. The only way this can be established is through a so-called computer expert. If the computer expert is permitted to carry conclusions into court and drop them before the jury without possibility of a searching inquiry, then the right to confrontation and cross-examination is meaningless. In essence, the violation of the Sixth Amendment is no different from that in *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Bruton* v. *United States*, 391 U.S. 123 (1968), or *Barber* v. *Page*, 390 U.S. 719 (1968). This same error also violated the Fifth Amendment guarantee of due process of law.

In contrast to the Government and the trial court, the opinion of the Court of Appeals makes light of the value of the computer testimony. At trial the Government emphasized the importance to its case of the computer testimony at the time it was offered (R. 1430) and in summation to the jury (R. 3463, 3467). Likewise, the Court refused to sustain objections which charged that the evidence was cumulative and not probative (R. 1429-1431, 1456, 1457-1458).

The issue is not what the Court of Appeals thinks the evidence was worth in fact, but what impact it had upon the jury. It cannot be seriously contended that the jury ignored this evidence in reaching its verdict. Having heard the wonders of this machine and its operator, they could

not but be awed by the conclusions which had been reached through the expenditure of much time and effort.

The Court of Appeals states that the computer simply revealed what was never seriously contested, *i.e.*, that First National had used Consumers' inventory. The opinion contends that the real issue was intent.

As verified by the prosecutor's argument to the jury (R. 3463, 3467), the Government's purpose, in resorting to a computer, was to establish that the defendants must have used far more raw materials in producing the products sold by them, than could be accounted for by an analysis of the raw materials they purchased. If a wide differential could be established which was substantially greater than the amount of Consumers' inventory that they admitted using and paying for, then the Government would have a basis to argue, as it did, that the defendants were lying as to the amount of inventory they had received from American. Once that was established, the conclusion of criminal intent was sure to follow in the minds of the jurors.

The question was not whether the inventory had been used, but, rather, how much had been used. For practical purposes, the issue of quantity and the issue of intent were one and the same. Not being able to reach into the minds of the defendants, the jury had to rely upon the circumstances presented at trial in order to determine intent. The computer "testified" that, within six days, the defendants had used the full amount of inventory that the Government claimed had been returned by American Kosher Provisions, Inc. It both corroborated and added to the testimony of FBI agent Lonergan, and directly contradicted the testimony of defendant-witness Plumeri.

Taking another approach, the Court of Appeals asserts that the sought after computer program "must have been one of utmost simplicity", "defense counsel must have realized" this, and "defense counsel could easily have checked the correctness of the computer's performance by adding machine or even manually, as the Government had itself done in one instance." These assertions appear to be grounded upon sheer speculation. In its "one instance" the Government took a test deck of IBM punch cards, containing the coded information from a limited number of the invoices, and ran the deck through the programmed computer. They then took the results and compared them with computations made on an adding machine, to verify the results. The defense was possessed of neither a test deck nor a programmed computer. If the whole of the computations could easily have been done on an adding machine, then the extensive work done by the Government in creating the computer print-outs was truly senseless.

In view of the highly incriminatory nature of the computer proofs, it cannot be said that the denial of confrontation and cross-examination was harmless beyond a reasonable doubt. The evidence to sustain a verdict of guilt was *not* so overwhelming that one can say, as a matter of law, that the error could not have influenced the verdict. Thus, the conviction herein should be reversed. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

POINT II

Petitioners' Fifth and Sixth Amendment rights to due process and to confrontation were violated when the district court permitted two unsworn prosecutors to advise the jury as to the fact that they had a private conversation with a key prosecution witness and as to the prejudicial content of that conversation.

Two of the prosecutors gave unsworn testimony that their own lead witness had not told the truth. They did so in such an improper and prejudicial manner as to warrant reversal of the judgments of conviction.

This first prosecution witness was Sol Alpert who was comptroller of American Kosher Provisions, Inc. during the period with which this case is concerned. He had participated in the negotiations which led to the buy-out contract, in the determinations concerning Consumers during the management period, and in the events on the day of the closing.

Alpert's testimony was interrupted by a luncheon recess. That afternoon, on recross examination, defense counsel asked him if he had had a conversation with any of the members of the prosecution's staff during the luncheon recess. He responded that he had not had any conversation. When pressed, he stated that if he did have such a conversation nothing was said other than that he asked one of them when he would be able to go back home to Miami. Recross examination then continued and was completed. Redirect examination by the prosecution followed.

At the end of redirect examination, one of the prosecutors, Mr. Obermaier, requested permission to approach the side bar. At the side bar he advised the Court that he had spoken

to Alpert during the luncheon recess and had told Alpert "... that I thought he had omitted purposely much important information on his direct examination, that he sounded more like Mr. Brill's [defense counsel] witness than he did our own" (R.577). He went on to say that he also had another conversation with Alpert during the recess in which Alpert asked him to sign a witness sheet which would authorize payment to Alpert for the costs of his trip to New York.

The second prosecutor, Mr. Goldberg, then advised the Court that he, too, had a conversation with Alpert during the luncheon recess in which "I specifically asked him why he did not mention the surety situation, and he had indicated to me that he thought I had suggested to him that in his testimony, he should only cover the high points and that the surety should be omitted."

The Court then asked defense counsel if the defense wished "to bring this out". Counsel responded that in view of what had happened, the defense was entitled to a hearing on this question out of the presence of the jury. Defense counsel also sought to advise the Court as to the reason that the defense had raised the issue in the first place, but the Court, although this was at the bench, would not permit him to do so. The Court denied the application for a hearing and insisted that defense counsel make a choice as to whether the information in question should be revealed to the jury or not. Defense counsel stated that he could not make that determination unless a hearing were first held.

The prosecutor suggested that the witness simply be asked if it were a fact that he spoke to the prosecutor (581). Defense counsel suggested that the question be deferred so that co-counsel could discuss it and reach a conclusion. The Court

adopted neither suggestion, and what follows occurred in open Court before the jury.

The Court directed Mr. Obermaier, one of the prosecutors,

> "To state in the presence of the jury his recollection of what transpired this afternoon in the corridor between the witness and himself, and I will now ask him to do that and limit himself to that. It will be a statement of his recollection."
>
> Mr. Obermaier: "It is my recollection that at the luncheon recess, I spoke with Mr. Alpert outside this room by the elevator, and I said to him that I thought that he had purposely omitted important testimony, damaging against the defendants, and that he sounded on cross examination more like Mr. Brill's witness than the government's witness.
>
> "Mr. Goldberg recalls the conversation at the same time in which Mr. Goldberg said to Mr. Alpert that he had omitted the testimony concerning the surety bond, to which Mr. Alpert responded that he had done this because he thought the testimony should only cover the highlights.

[Colloquy]

> "The only other conversation I had with Mr. Alpert was during the recess that was declared this afternoon at approximately 3:30. I signed a witness form authorizing a payment of the statutory fees for witnesses who come from other states, and I asked him whether he had a reservation to return to Miami, and he said he did not."

The other prosecutor, Mr. Goldberg, then addressed the jury as follows:

> "If your Honor please, I think that with respect to the conversation which I had with Mr. Alpert, it

is my recollection outside of the courtroom this morning that I had inquired of Mr. Alpert why he did not mention the surety bond situation. Mr. Alpert replied that he thought that I had suggested to him not to mention that particular element and that I only wanted the highlights or capsulized form.

"I suggested to him that I had not so said that to him, but that it was true that I wanted him to give on his testimony the highlights of what occurred at that meeting, and that if Mr. Brill wished to bring up the surety situation, that was up to him. That is the extent of my conversation."

The Court then asked Alpert if, after reflection, he recalled the conversations as being the same or substantially the same as what was described by the prosecutors. The witness responded "This may have taken only two and a half seconds or two and a half minutes, but I would imagine it is substantially about what they may have said."

All of the above having taken place over the objection of defense counsel, the defense moved for a mistrial, which was denied (R. 586-587).

Thus, by a situation of their own creation, where the prosecutors cornered their own lead witness during a luncheon recess in the midst of his testimony, and accused him of deliberately falsifying his testimony to the benefit of the defendants, the prosecutors were later obliged to advise the court that the witness had not told the truth when questioned about the incident during recross-examination. They waited until recross-examination and further redirect examination were completed before they did so.

The witness had either lied or had a mistaken recollection. The defense sought to have the full facts brought out in the absence of the jury, before making the determina-

tion whether it would be prejudicial to the defense if the content of that conversation was revealed. At least, they wanted some time to confer as to the appropriate course of action—it was clear that there would be ample time, since this was the first witness in a lengthy trial.

Arbitrarily, the court denied both requests, as well as the suggestion of the prosecutor that the information be elicited from the sworn witness who had made the misstatement in the first place. The court, with full knowledge as to what the prosecutors would say (but taking the chance that they might say more), directed them to give the jury their unsworn recollection of the fact and content of their conversations with the witness.

Aside from being an impeachment by the prosecution of its own witness, both as to the fact of the conversations, and as to the facts of the testimony about which they had criticized him, the prosecutors' statements constituted unsworn testimony, without the benefit of cross-examination, containing rank hearsay and opinion. Such unsworn testimony was manifestly improper. *Berger* v. *United States,* 295 U.S. 78 (1935); *United States* v. *Spangalet,* 258 F.2d 338 (2d Cir. 1958). That it violated the right of confrontation guaranteed by the Sixth Amendment, is made clear by this Court's opinion in *Parker* v. *Gladden,* 385 U.S. 363 (1966).

Parker involved a bailiff who made improper remarks to a trial juror concerning the disposition of the case. This Court said:

> "We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment made applicable to the States through the due process clause of the Fourteenth Amend-

> ment. It guarantees that 'the accused shall enjoy the rights to a * * * trial, by an impartial jury * * * (and) be confronted with the witnesses against him * * *'. As we said in *Turner* v. *State of Louisiana*, 379 U.S. 466, 472-473, 'the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross examination and of counsel.' Here there is dispute neither as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross examination or other safeguards guaranteed to the Petitioner. Rather, his expressions were 'private talk' tending to reach the jury by outside influence." 385 U.S. at 364-465.

No meaningful distinction can be made between *Parker* v. *Gladden* and the present case.

In attempting to justify the trial court's course of action, the Court of Appeals refers to the so-called "principle of completeness" mentioned in 7 Wigmore, Evidence §§ 2094, 2097 (3d ed. 1940) (*infra*, p. 40). A careful reading of Wigmore reveals nothing which would justify the procedure followed here. The Court of Appeals advances this principle as being necessary, ". . . so as to rebut, for example, any inference that the prosecutors had urged Alpert to lie." (*Ibid.*). As the testimony stood, at that point, there was no such inference that could be drawn. Alpert had denied any conversation about the case, and that was it. By virtue of the prosecutors' unworn statements to the jury, however, there was an inference which could be drawn: That the jurors could reasonably believe, from the content of the corridor conversation, that the witness had falsified his direct testimony at the behest of the defendants, or, at least, that the prosecutors believed this to be the case.

POINT III

The District Court's instruction that Plumeri's testimony was to be considered in light of his interest in the outcome of the case constitutes prejudicial error in violation of 18 U.S.C. § 3481 and due process standards.

Plumeri was the only defendant who testified. He was called to the stand in his own behalf and in behalf of his codefendants. The District Court committed prejudicial error in instructing the jury that the defendant's interest in the case is different from that of the other witnesses and that the defendant has a greater motive to falsify his testimony. The specific instruction of the Court was as follows:

> "You may consider whether a witness has a possible interest in the case or a motivation to lie or to testify favorably or unfavorably for one side or the other, such as an interest in the defendant or an interest in an employee of a defendant.
>
> "In this case, for instance, the defendant Plumeri has taken the witness stand and testified in behalf of the defendant. It is proper for you to consider the personal interest which he has in the outcome of this criminal proceeding against him in determining the extent to which his testimony is worthy of belief.
>
> "Interest can create a motive to falsify or color testimony, and the greater the interest the stronger is the temptation to do so. The interest of a defendant in a criminal case is of a character possessed by no other witness and is therefore a matter which might affect his credibility."

The above instruction to the jury constituted prejudicial error, for a defendant who wishes to testify is a competent witness (Title 18, U.S. Code, §3481), and his testimony is to be judged in the same way as that of any other witness. As

this Court said in *Raffel* v. *United States,* 271 U.S. 494 (1926):

> "When he [defendant] takes the stand in his own behalf, he does so as any other witness . . . ."

In *United States* v. *Klass,* 166 F. 2d 373 (3d Cir. 1948) reference was made to:

> ". . . the well-settled rule that a defendant who offers himself as a witness in his own behalf has the same privileges and suffers the same limitations which inhere in witnesses generally."

Accord, *Pendergraft* v. *State,* 191 So. 2d 830, 836 (Sup. Ct. Miss. 1966); *Hall* v. *State,* 165 So. 2d 345, 350-351 (Sup. Ct. Miss. 1964); 27 F.R.D. 74.

Thus, the District Court led the jury to believe that it could reject as false Plumeri's testimony because of his interest in the outcome of the case. In *Phillips* v. *State,* 196 So. 2d 363 (Sup. Ct. Miss. 1967), a conviction was reversed because of a similar instruction.

The opinion of then Circuit Judge Blackmun in *Taylor* v. *United States,* 390 F.2d 278 (8th Cir., 1968) reviews the authorities concerning the propriety of a court's charge as to the interest of a testifying defendant in a criminal proceeding. While upholding the instruction given in that case, the opinion noted:

> "We do not hesitate to observe, however, that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated if the defendant were included by reference in the court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious

> to the jury. A general reference, such as 'including the defendant', should suffice. Or the simple instruction proposed by Mathes & Devitt, Federal Jury Practice and Instructions, §9.12 (1965), namely, 'A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness', might be considered for use and should withstand attack of the kind present here." 390 F.2d at 285.

An examination of the District Court's charge on the credibility of witnesses reveals:*

(1) Plumeri, who testified in behalf of the joint defense, was the only witness to be singled out as having a motivation to commit perjury;

(2) The court dwelt at length upon Plumeri's credibility, far more so than the instruction under consideration in *Taylor, supra.*

(3) The court's language was in the most incisive terms possible, short of instructing the jury, outright, that the defendant probably committed perjury;

(4) The court deprecated Plumeri's testimony in no less than four separate ways: as an employee of the corporate defendant; as a defendant himself; as one who had allegedly given prior inconsistent statements; and as one who had been convicted of possessing policy slips.

Petitioners submit that the presumption of innocence which ought to attach to a defendant in a criminal case is effectively nullified by such instructions to a jury. Additionally, Plumeri's right to testify was nullified by telling the jury in effect that because he took the stand, the jury should consider him a liar.

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* See also Points IV and V, *infra.*

POINT IV

The District Court committed prejudicial error by charging the jury that Plumeri's conviction in 1960 for possessing policy slips may be considered in appraising his credibility.

There was evidence that petitioner Plumeri was convicted in the State of New York in 1960 for possession of policy slips. After charging the jury that because Plumeri took the stand he had a greater motive to falsify his testimony, the District Court further proceeded to disparage Plumeri's testimony by charging as follows:

> "Another matter that may be considered by you in appraising the credibility of a witness is whether he has ever been convicted of a crime and whether he has made any prior statements that are inconsistent with his testimony here.
>
> "In the present case, for instance, it was evident that the defendant Plumeri had been convicted of possession of policy slips in the State of New York."

The Court concluded this portion of the charge by saying:

> "If you find that a witness has been discredited or impeached, partially or wholly, for any of the reasons I have indicated, to sum it up, you may give his testimony such credence as you think it deserves."

Such charge cannot have been more prejudicial to Plumeri. Precisely what relationship has a conviction in 1960 for possession of policy slips to Plumeri's credibility on the issue of bankruptcy fraud years later?

The factors to be taken into account in evaluating such an issue are well established and were stated in *United States* v. *Coleman,* F.2d (D.C. Cir. July 11, 1969). The *remoteness* in point of time between the prior conviction and the present case is obvious. The alleged crimes are not *similar,* and the prior conviction has no special bearing on the issue of credibility. The *prejudice* to Plumeri stands out on the record, for it was not the Government but the Court itself which was speaking. Since the jury has the highest respect for the trial judge and will follow his intimations, there can be no doubt that the jury assigned great weight to the aforesaid charge because of its judicial sponsorship. Thus, this portion of the charge constituted plain error.

Through such charge, the trial judge was in effect commenting on Plumeri's credibility. Such comments infringed too much on the jury's own fact-finding functions. The trial judge's role should remain as the presenter of the law to the jury for its uninhibited finding of the facts.

POINT V

The District Court further disparaged Plumeri's testimony by preventing him from directly denying the charges of the indictment and then by casting doubt on the effect of such testimony.

During Plumeri's direct examination, defense counsel asked him whether he denied the allegations of the indictment. The court said that the question was improper. When Plumeri was then permitted to answer questions addressed to his intent to commit the crimes charged in the indictment, the trial judge called it "a conclusion" and not "evi-

dence". The trail judge was obviously in error, for ". . . the state of a man's mind is as much a fact as the state of his digestion." *Edgington* v. *Fitzmaurice,* 29 Ch. D. 459, 483 (1885). Thus, the District Court was mistaken in (i) preventing Plumeri from directly denying the allegations of fact in the indictment and then, when he was allowed to testify, (ii) in wrongfully labeling his testimony a "conclusion." Such disparagement by the District Court, together with its charge, effectively destroyed Plumeri's right to testify and, indeed, his testimony itself in the eyes of the jury.

Specifically, the following occurred during Plumeri's examination. Defense counsel formulated the language of the conspiracy count of the indictment into a question and asked Plumeri, "I ask you, Tom: Did you do that?" Plumeri replied, "No, sir." (R. 2638-2639-A). No objection was made by the Government during or after the asking of the question and the giving of the answer. Following the answer, the Court saw fit to hypothesize an objection, and exclaimed, "Sustained. You know that kind of question is improper." (R. 2640). Defense counsel replied that he had "been permitted time after time by judges in this court to ask such a question as a direct denial of the allegations of the indictment", and there then followed this colloquy:

> "The Court: He has pleaded not guilty.
>
> "[Defense Counsel]: He has pleaded not guilty and I am asking him substantively now if he did what he is charged with doing. Does your Honor say that I may not ask him whether he did or did not do the things alleged in this indictment?
>
> "The Court: I am saying that is unnecessary to do. This is a conclusion. The reason we are here is to listen to evidence." (R. 2640).

Defense counsel was then permitted to ask Plumeri several questions addressed to his intent to commit the crimes charged in the indictment, and the following then occurred:

> "Q. Did you knowingly and intentionally conceal any assets from the trustee in bankruptcy of Consumers Kosher?
>
> "[Prosecutor]: I object to this as repetitious.
>
> "The Court: Overruled.
>
> "A. No, Sir.
>
> "The Court: It is a conclusion but I will overrule the objection.
>
> "[Defense Counsel]: I respectfully except to your Honor's remark."

The right of a defendant to address himself to the charges against him is fundamental. This Court has said:

> "Whenever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876).

That right is guaranteed by the Sixth Amendment of the United States Constitution and by Congressional direction, 18 U.S.C. 3481, *supra*.

In those crimes where the essential element to be proven is intent, the only witness who can swear to the state of the defendant's mind, is the defendant himself. The divergent

views, as to the permissibility of a defendant's giving such testimony, are concisely set forth by Dean Wigmore:

> "Under the influence of some obscure suggestion, not easily traceable, the view has been often urged upon Courts that a person — especially a party — should be disqualified from *testifying to his own intent* or motive, even where that intent or motive is material to be investigated.
>
> "The argument is (so far as any has been vouchsafed) that such testimony may be falsified without the possibility of detection, and that therefore it is dangerous to permit an interested person to allege, in effect, whatever he pleases as to his own state of mind.
>
> "The answers to this argument are various and sufficient. In the first place, there is no precedent for it in the inherited common law; it is an attempt to create a rule without an analogy in the accepted doctrines of the judicial rulings. In the next place, it assumes that there is no counter-evidence available, and yet asks that the only evidence which it assumes to be available shall be excluded, — in other words, asks that a concededly proper issue be submitted to the jury with no evidence at all. In the third place, its assumption is incorrect in fact, namely, that there is no other available and sufficient evidence of intent or motive by which the person's own testimony can be tested and checked; for the evidence from conduct and circumstances and from others' testimony is not only a permissible but a potent source of belief, and is amply sufficient to guard against falsification. Finally, the argument is at least of no higher value than the argument in favor of the unsatisfactory statutory rule against survivors' testimony. It is merely of a piece with all crude attempts to disqualify a witness by reason of interest, —attempts which to-day must stand discredited by the general repudiation of that species of disqualification." WIGMORE ON EVIDENCE (3rd Ed.) §581.

In *Walder* v. *United States*, 347 U.S. 62 (1954), which concerned the breadth of inquiry which is permitted in the prosecution's cross-examination of a defendant, this Court held:

> "* * * Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. *He must be free to deny all the elements of the case against him*, without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U.S. at 65. [Emphasis added.]

See also: *Johnson* v. *United States*, 344 F.2d 163 (D.C. Cir., 1964); *Tate* v. *United States*, 283 F.2d 377 (D.C. Cir., 1960); *Poe* v. *United States*, 233 F. Supp. 173 (Dist. Col., 1964), aff'd, 352 F.2d 639 (D.C. Cir., 1965).

Explicit in this line of decisions is the right of the defendant to take the stand and deny, under oath, the full charge against him, as well as each of its essential elements. That right was denied and disparaged by the trial court in the present case.

The Court, on its own motion, immediately upon Plumeri's denial of the full text of the conspiracy charge, announced that the question was "improper", and that the answer was "unnecessary", "a conclusion", and not "evidence". Thereafter, when Plumeri was asked if he had knowingly and intentionally concealed the assets of the bankrupt, the Court branded his denial as a "conclusion."

By effectively destroying whatever value the testimony might have had in the jury's consideration, Plumeri was deprived of his right "to deny all the elements of the case against him." *Walder* v. *United States, supra.* In sum, the District Court's treatment of Plumeri's credibility denied him due process of law.

POINT VI

Petitioners were unduly prejudiced by the fact that a codefendant had been notoriously and disparagingly publicized under an alleged alias. The District Court improperly denied defense motions that the alias be stricken from the indictment and not used at trial.

Petitioners adopt Point IV of the Dioguardi petition for certiorari. That Point reveals that the indictment in the present case identified Dioguardi as "John Dioguardi, a/k/a Johnny Dio." Because of extensive publicity, the alias of "Johnny Dio" was associated by the public with an individual alleged to be a notorious criminal. Nonetheless, the District Court denied the defense motion that the name "Johnny Dio" be stricken from the indictment and that the prosecutor be instructed not to make any reference to that alias during the trial (R. 4174-4178). The result was that petitioners herein were tried together with Dioguardi on conspiracy charges, *inter alia*, and they could not but have been prejudiced by being thus associated in the jury's mind with "Johnny Dio."

As is set forth in the Dioguardi petition, most prospective jurors recognized Dioguardi's name under the alleged alias, rather than under his true name, and most of them had heard it associated with crime. No witness who testified required the use of the alias to identify Dioguardi and there was no evidence with which that alias was connected. However, the Court and the prosecution utilized it in questioning witnesses (*e.g.*, R. 429, 431, 433, 1165-6).

During the course of its deliberations, the jury requested a copy of the indictment. The defense requested that the alias be stricken from the indictment before it was sent to

the jury, but this application was denied (R. 3625-3627). The jury was thus exposed to information about a codefendant which had the effect of destroying the jury's objectivity not only as to that codefendant but as to petitioners as well. The result was a violation of the standards of due process that should be corrected by this Court as the judicial supervisor of the administration of criminal justice in the federal courts. See *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907); *Chambers* v. *Florida*, 390 U.S. 227, 236-237 (1940); *Bridges* v. *California*, 314 U.S. 252, 271 (1941); *Marshall* v. *United States*, 360 U.S. 310, 312-313 (1959); *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

There would appear to be a conflict between the Second and Third Circuits on this issue. While both Circuits agree that the use of aliases is improper, the Second Circuit does not consider it sufficient to warrant reversal [*United States* v. *Grayson*, 166 F. 2d 863, 867 (2d Cir. 1948)], while the Third Circuit would apparently reverse if the error were called, as here, to the attention of the Trial Court [*D'Allessandro* v. *United States*, 90 F. 2d 640, 641 (3d Cir. 1937)].

CONCLUSION

For the reasons stated, the writ of certiorari should be granted.

Dated: New York, New York
June 25, 1970

Respectfully submitted,

JEROME J. LONDIN,
Counsel for Petitioners

APPENDICES

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 171—September Term, 1969.

(Argued April 21, 1970 Decided May 27, 1970.)

Docket No. 32043

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOHN DIOGUARDI, a/k/a Johnny Dio, THOMAS PLUMERI, DAVID PERLMAN and FIRST NATIONAL KOSHER PROVISIONS, INC.,

Defendants-Appellants.

Before:

MOORE, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* convicting defendants, after a verdict, of offenses against the bankruptcy laws, 18 U.S.C. §§152 and 371. Affirmed.

OTTO G. OBERMAIER, Special Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Jay S. Horowitz and

Paul B. Galvani, Assistant United States Attorneys, of Counsel), *for Plaintiff-Appellee.*

Jerome J. Londin, Esq. (Joseph E. Brill, Esq., New York, New York, of Counsel), *for Defendants-Appellants John Dioguardi, Thomas Plumeri and First National Kosher Provisions, Inc.*

Jacques M. Schiffer, Esq., Rockville Centre, New York, *Attorney for Defendant-Appellant David Perlman* (John L. Pollok, On the Brief).

Friendly, *Circuit Judge:*

Defendants were charged with the substantive crimes of fraudulently transferring and concealing the property of a bankrupt in contemplation of bankruptcy, and of fraudulently concealing the bankrupt's assets from the trustee in bankruptcy in violation of 18 U.S.C. §152, and a conspiracy to do the same, 18 U.S.C. §371. In 1967, after an 18 day jury trial in the District Court for the Southern District of New York, they were convicted on all three counts. We affirm.[1]

The bankrupt, Consumers Kosher Provisions, Inc. (Consumers), was under the effective control of defendant John

[1] The two and a half year lapse since conviction was due in large part to the necessity for remanding the case, in March 1968, at the request of the Government, for a hearing with respect to electronic surveillance. The district court held proceedings in abeyance pending the Supreme Court's decision in *Alderman* v. *United States*, 394 U.S. 165 (1969). It then found, after hearing, that the convictions were not affected by a single unrelated instance of electronic surveillance of appellant Dioguardi. We find no fault with this determination.

Dioguardi. Defendant David Perlman had the title of president and defendant Thomas Plumeri was an important employee. In the summer of 1964, while Consumers was experiencing serious financial difficulties, Dioguardi negotiated a contract with American Kosher Provisions, Inc. (American), a successful competitor. The contract, dated August 15, 1964, provided that American would purchase all Consumers' stock, represented to be 72½ shares; assume its obligations, including five-year employment contracts with Dioguardi and Perlman; and take over operations pending the closing, which was to be not later than October 27. When the parties met that day, Consumers' attorney, J. Jack Brown, failed to produce a certificate for the 27½ shares owned by the estate of Herman Rose, whose executrix had signed the contract; Brown claimed he had not had sufficient time to qualify her. It also turned out that, in addition to the 72½ shares specified in the contract, there were another 27½, owned by Morris Meat Market, Inc. Brown suggested that since all the officers, directors and stockholders of Morris were present, the shares could be transferred at that time although Morris' financial records indicated this might render it insolvent.

American's counsel naturally refused to permit his client to close. Two officers of American, Alpert and Krutchik, said that creditors of Consumers had been holding off pending the closing; that under the circumstances they would not consent to an extension; and that the following morning the creditors would be notified the deal was off. Alpert instructed Krutchik to take an inventory, with a representative of Consumers, and return the Consumers property located at its own plants. After complications unnecessary to detail, in which all three defendants were involved, the

inventory was completed in the early morning hours of October 29, and defendant Plumeri gave a receipt for the goods. Later, American inventoried and returned the Consumers property that had been at American's plant; receipt of this property was also acknowledged by Consumers. According to American's recapitulation, the total property returned amounted to $32,452.57, valued at cost: Raw meat, finished and semi-finished products accounted for $10,071.54, and supplies, such as spices, casings, boxes and other containers, made up the balance.

Toward the conclusion of the inventory taken on October 29, Dioguardi told American's general manager that he was going into business under the name of First National Kosher Provisions, Inc. (First National), a hitherto inactive corporation he controlled. Operations were conducted in Consumers' plant and with its leased trucks. New books were opened and First National's name was substituted on Consumers' invoices and sales tickets. To obtain working capital, defendant John Dioguardi, along with defendant Perlman and attorney Brown, obtained from one Sol Lichter a $10,000 check to Dominick Dioguardi, payment of which John Dioguardi guaranteed. No note was given or time of payment specified, and the loan had not been repaid at the time of trial. This check and an additional $10,000 provided by John Dioguardi were used to open a First National account at the Central State Bank; Plumeri, Perlman and Dominick Dioguardi were listed as the corporate officers.

First National began business by utilizing Consumers' inventory; it had no other. The Government's evidence was that the entire Consumers inventory was so utilized.

Haberman, an accountant engaged by Dioguardi, called him and reported that First National's profit figures for November were "unduly" high; Dioguardi promised an answer. At a meeting with Haberman shortly thereafter, Dioguardi and Plumeri produced an invoice purporting to represent the total pounds of Consumers' meat that First National had used. The figure $5523, although well below actual cost, was then assigned as the value of the meat and Haberman said he would carry this as a liability to Consumers. His workpapers so showed it, but it was not carried into First National's financial statements. Later Dioguardi remarked to Haberman that the $5523 would be paid to Consumers when First National received a bill. It never did.

On January 25, 1965, three creditors filed a petition in bankruptcy against Consumers. It was later adjudicated a bankrupt and, on March 2, 1965, Herman Sommers was appointed trustee. In the interval defendants moved First National from Blake Ave., Brooklyn, to East 180th Street in the Bronx, taking some of Consumers' equipment and fixtures with them. These were ultimately discovered by the trustee and, together with the fixtures and equipment left at Blake Ave., realized $3500. Consumers' estate, with debts of over $265,000, had no other assets.

Although much dust was scattered over details concerning the amount and value of the inventory that was used, the theory of defense was that attorney Brown had sanctioned the use of Consumers' inventory and plant as a means of attempting to salvage something for Consumers' creditors, although the latter were never advised of defendants' intentions. Brown, whose testimony was re-

plete with inconsistencies, supported this to some degree. Plumeri was the only defendant to testify. Despite or perhaps partially because of this and other testimony adduced by the defense, it is apparent, without burdening this opinion with more detail, that the jury was abundantly justified in rejecting defendants' version and accepting the Government's theory that defendants deliberately aborted the closing with American and then helped themselves to Consumers' property. Appellants' contention of insufficient evidence thus borders on the frivolous, and we turn to claims of trial error.

II.

Alpert, of American, was the first Government witness. During the luncheon recess, the prosecutors mentioned to him in the corridor that he had omitted to testify to several facts he had previously disclosed. On recross examination that afternoon he denied having talked with the prosecutors during the recess, other perhaps than to ask when he could return to Miami. At the conclusion of redirect examination the prosecutors requested a conference at sidebar and revealed the conversation. The judge asked defense counsel whether they wished to bring this out and proposed as alternatives a statement by the prosecutors or further examination of Alpert. Counsel insisted on a hearing outside the presence of the jury, which the judge denied. The prosecutor said he would not object if defense counsel wished to ask Alpert whether it wasn't a fact that he had spoken to the prosecutors in the corridor. The judge urged defense counsel to cooperate "to the extent of advising whether you wish that revealed to the jury or

whether you think your clients would be in any way prejudiced by revealing it to the jury." When counsel declined, the court directed the prosecutors to tell the jury what had occurred.

The leading prosecutor then stated to the jury that, contrary to Alpert's testimony, he had told Alpert during the recess that he throught the latter "had purposefully omitted important testimony, damaging against the defendants, and that he sounded on cross-examination more like Mr. Brill's witness than the government's witness." He added that his associate had remarked about Alpert's failure to mention an offer by American to close if the sellers would furnish a surety bond for protection; the associate went into greater detail about this.[2] The judge then asked Alpert whether the prosecutors' statements were true. Alpert answered he "would imagine it is substantially about what they may have said." Defendants' motion for a mistrial was denied and, after a few further questions by defense counsel, Alpert was excused.

We have some difficulty in understanding just what is claimed to have been wrong about this. The court could not leave the record with a lie by Alpert known to the prosecutors but not disclosed to the jury, unless defendants preferred to waive the point—which they were given an opportunity to do. If the criticism is that the prosecutors got before the jury not only Alpert's false answers but their belief that he had failed to give other damaging testimony, this was defense counsel's own doing; the prosecutor had offered to let them expose the prevarication

[2] The prosecution had already developed this in Alpert's redirect examination.

simpliciter. Moreover, if the episode was to be brought out, as defense counsel had forced it to be, the prosecution was entitled under the principle of completeness, see 7 Wigmore, Evidence §§2094, 2097 (3d ed. 1940), to bring out the whole conversation, at least in the absence of serious prejudice to the defendants, so as to rebut, for example, any inference that the prosecutors had urged Alpert to lie. We likewise fail to see why, on what he had before him, the judge was compelled to order a hearing outside the presence of the jury. The purpose of such a hearing would have been to assist defense counsel in making an informed tactical choice. But the judge was convinced, properly as matters turned out, that they had already heard all there was. The case would stand differently if the prosecutor had taken advantage of the situation by placing before the jury inculpatory material not disclosed at sidebar and not otherwise in evidence.

III.

A more serious point is the Government's failure to produce the program by which its witness Row had instructed a computer to prepare figures showing the dates when First National had exhausted the various items of Consumers' inventory turned over by American.

A previous witness, Lonergan, had calculated First National's purchases of raw materials and sales of finished products during the period from October 29 to November 26, 1964, and its inventory of both on November 27. He determined the sales to have amounted to 105,648 pounds and the inventory to 42,679 pounds, a total of 148,327 pounds. Purchases had been 108,475½ pounds. Deduction

of these left 39,851½ pounds that must have come from some other source, presumably Consumer's inventory, although this appeared to have been only 25,569½ pounds. Defendants had criticized Lonergan's data and computations on numerous grounds.

Row used as input data this figure of Consumer's inventory and Lonergan's tabulations of various slips showing First National's purchases of raw materials and sales of finished products. The computer was then instructed to determine the dates when, on the basis of first in, first out, Consumers' inventory would have been exhausted both for specific items and in gross; the answer to the latter was November 5. When the Government offered print-outs showing the computer's answers, defendants were granted an extensive *voir dire*.

The defense began by bringing out that Row had made no independent examination but had relied on Lonergan's work. Criticisms previously made with respect to that testimony were repeated, and it was contended that Row had ignored some of Lonergan's data. Mr. Schiffer, counsel for Perlman, moved to strike Row's testimony and to exclude his exhibits on these grounds. The motion was denied. Mr. Brill, representing the other defendants, then raised the contention that the program given the computer was producible under the Jencks Act. 18 U.S.C. §3500. The judge did not agree. Mr. Brill next went into more questions to bring out again that Row had not participated in the preparation of the underlying documents, and that the computation had been made on the principle of first in, first out. The prosecutor developed that in order to assure the accuracy of the computer's work, "a test deck was created

which would be a sampling of the information we have in this case, the tabulating cards, and they were run through the computer using the program, and then this was manually verified to make sure that the computer had come out with the right answers." After all this, court was adjourned at Mr. Brill's request to enable him to make motions the next morning.

When the court met, this time outside the presence of the jury, Mr. Brill referred to a motion of the previous day "with respect to the 3500 material," which he indeed had made, and "a motion upon the failure of the government to supply the programming material on the basis of which Mr. Row's testimony was given," which had not been made except insofar as he and Mr. Schiffer had raised the point of alleged absence of certain needed data. In answer to a question from the court concerning §3500, he went into an extensive argument on that score. Nothing more was said regarding the defense's right to the program quite apart from the Jencks Act. The judge denied the motions. Mr. Brill then asked that the program be marked as a court exhibit, as is commonly done with material held to be non-producible under the Jencks Act. The prosecutor denied having or having had it. Mr. Brill moved that the prosecutor be directed to obtain it; the court declined. Then, after having moved to strike the testimony and exhibits of Lichter and of the representative of the Central State Bank, some testimony of Alpert and much of the testimony of Sommers, Mr. Brill moved to strike Row's testimony and the print-outs on the ground "that this testimony is based upon the hearsay evidence of a mechanical or an electronic computer which was not itself subject to cross-examination, thereby denying the defendants the constitutional right of

confrontation and cross-examination. . . .'' The court denied this. Motions to strike the testimony and exhibits of Lonergan and Krutchik were also denied.

We fully agree that the defendants were entitled to know what operations the computer had been instructed to perform and to have the precise instruction that had been given. It is quite incomprehensible that the prosecution should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross-examination if desired. We place the Government on the clearest possible notice of its obligation to do this and also of the great desirability of making the program and other materials needed for cross-examination of computer witnesses, such as flow-charts used in the preparation of programs, available to the defense a reasonable time before trial. See *United States* v. *Kelly,* 420 F.2d 26 (2 Cir. 1969). However, we do not believe the interests of justice require reversal of these convictions because of what occurred here.

To begin, we have the gravest doubt whether defense counsel made intelligible to the court what we deem their one meritorious point concerning the program, a point first clearly expressed in the reply brief in this court, namely ''that without the 'program' it [the defense] could not properly test the validity of the results of the computer nor could it properly cross-examine Mr. Row.'' Although close scrutiny of the record we have summarized in what must have seemed tedious detail may enable one, reading with the benefit of hindsight, to glean the argument that the defense was entitled to check just what the computer had been asked to do, any suggestion of this was buried

in the avalanche of other arguments, especially the claim with respect to §3500. That claim was wholly without merit, as mere reading of the statute, let alone consideration of its purpose explicated in *Palermo* v. *United States*, 360 U.S. 343 (1959), plainly shows. Despite frequent judicial reminders, counsel cannot seem to understand that rather than being the Magna Carta of the right to production, the Jencks Act is a restriction on it in certain respects. It would thus be unfair to the trial judge and a waste of the time of another judge and jury for us to direct a new trial for failure to compel production of the program unless there is an appreciable risk that prejudice resulted. We do not believe there is, for a number of reasons.

The instruction here given the computer must have been one of utmost simplicity, as defense counsel must have realized—to start with the opening inventory, sum up the purchases and sales for each day, subtract the latter from the opening inventory, and repeat the process until the opening inventory was exhausted—in this case six times. Moreover, and more important, the data were so limited that defense counsel could easily have checked the correctness of the computer's performance by adding machine or even manually, as the Government had itself done in one instance.[3] To be sure, that would not be a sufficient answer

[3] This would have taken very little more time, if any, than it took the Government to use the computer. The key-punch operator had to punch a card for each slip, recording the item, quantity, date and whether it was a purchase or sale. The computer then processed this information in accordance with the program. Similarly, if an adding machine were used, only one entry per slip would have been necessary. The only discernible difference is that manual sorting of the slips according to date, item, and type of transaction would have been required before the adding machine operator could begin. Given the limited number of entries, this difference is hardly significant.

if the trial had ended shortly after Row's testimony and there now appeared to be any real likelihood that the computer might have failed in its simple task. But neither of these contingencies exists. The trial lasted for another ten days; defense counsel thus had ample opportunity to check the computer's performance or, for that matter, to renew their demand for production of the program, or request a subpoena, in a more readily understandable way. Even now, two and a half years after the trial, we are pointed to no error in the computer's calculations. Finally, Row's testimony was a quite unnecessary frill. It was not really disputed that First National had made use of Consumer's inventory; the controversy was whether the individual defendants intended to pocket the profit or pay Consumers for what First National had used. The precise date when Consumers' inventory would have been exhausted on a first in, first out basis had only a peripheral bearing on that issue.

IV.

The only other contentions that warrant comment are a variety of claims that defendant Dioguardi was denied a fair trial because of his known association with organized crime.

The judge acted well within his discretion in denying motions for a continuance or change of venue. Many of the articles referring to the case were in publications having limited or no circulation in the Southern District of New York. With respect to others, which referred to Dioguardi's connections with the Mafia, we echo Judge Weinfeld's observations in *United States* v. *Kahaner*, 204 F. Supp. 921, 924 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2 Cir.),

cert. denied, 375 U.S. 836 (1963), and our own in *United States* v. *Grassia,* 354 F.2d 27, 29 (2 Cir. 1965), *rev'd on other grounds,* 390 U.S. 202 (1968). We add the counsel of experience that transfer from a metropolitan area to a smaller city may result in more rather than less intensive publicity.

Judge Mansfield's examination of the jurors, far from being subject to valid criticism, seems to have been a model which other trial judges could utilize to advantage in cases of this sort—save in one particular. In examining at sidebar prospective jurors who had read or heard anything about any of the defendants in the case, the judge did not arrange to have the defendants close by. See F.R.Cr.P. 43. However, they were seated only 15-20 feet away; their experienced counsel, who had been earlier advised of the proposed procedure, did not ask that they be allowed to come nearer;[4] most of the jurors thus questioned were excused by the court; ample time was given for counsel to consult with defendants concerning challenges; and all the jurors whom the court had not excused were challenged either by the defendants or the Government.

The remaining point is that the indictment, which was sent to the jury over objection, described Dioguardi as "a/k/a Johnny Dio," the name by which he was often described in articles about the underworld; that the prosecutors asked two witnesses whether they knew Dioguardi by another name; and that on one occasion the court inadvertently referred to him as Mr. Dio. While we see no occasion for the Government's having inserted the added phrase in the indictment or for the prosecutors' questions,

[4] When the point was first raised, at the hearing on sentences, the judge stated he would have granted such a request.

since the witnesses all knew Dioguardi under his full name as well, see *United States* v. *Monroe,* 164 F.2d 471, 476-77 (2 Cir. 1947), *cert. denied,* 333 U.S. 828 (1948); *United States* v. *Grayson,* 166 F.2d 863, 867 (2 Cir. 1948); contrast *United States* v. *Miller,* 381 F.2d 529, 536 (2 Cir. 1967), *cert. denied,* 392 U.S. 929 (1968); *United States* v. *Valenti,* 74 F. Supp. 718 (W.D. Pa. 1947); *United States* v. *Melekh,* 193 F. Supp. 586, 595 (N.D. Ill. 1961), the defense itself had caused the Dio name to be brought before the jurors as a result of its claims with respect to pre-trial publicity. Moreover an abbreviation, unlike a true alias, does not "arouse suspicion that the accused is a person who has found it useful or necessary to conceal his identity." *United States* v. *Grayson, supra,* 166 F.2d at 867. It is thus even clearer than in *Grayson* that "the references complained of would not in our judgment even remotely tend to justify a reversal."

Affirmed.

SMITH, *Circuit Judge* (concurring):

Were this case at all close on the issue of whether First National used the bankrupt's assets with no intention of paying for them, I would be inclined to dissent on the ground that the computer program should have been produced in spite of the erroneous reliance on section 3500 in the request for it. But I agree that there was no real dispute on the issue of the use which was affected by the accuracy of the computer, and concur in the affirmance of the judgment.

APPENDIX B

Constitutional Provisions and Statutes Involved

UNITED STATES CONSTITUTION:

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix B—Constitutional Provisions and Statutes Involved

UNITED STATES STATUTES:

18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy

law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 689; June 12, 1960, Pub.L. 86-519, § 2, 74 Stat. 217; Sept. 2, 1960, Pub.L. 86-701, 74 Stat. 753.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 3500 Demands for production of statements and of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony

of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

18 U.S.C. § 3481. Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 308

JOHN DIOGUARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 315

THOMAS PLUMERI AND FIRST NATIONAL KOSHER PROVISIONS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (App. A to both petitions) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1970. The petition for a writ of certiorari in No. 308 was filed on June 22, 1970, and the petition

in No. 315 was filed on June 25, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error in not turning over to the defense the program of instructions given to a computer to tabulate inventory.

2. Whether the details of a conversation between the prosecution and a witness during a recess in the trial were properly disclosed to the jury.

3. Whether the trial court disparaged the testimony of petitioner Plumeri.

4. Whether the references to petitioner Dioguardi under the abbreviated name of Dio deprived petitioners of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of fraudulently concealing the property of a bankrupt in contemplation of bankruptcy, of fraudulently concealing the bankrupt's assets from the trustee in bankruptcy, both in violation of 18 U.S.C. 152, and of conspiring to commit the substantive offenses in violation of 18 U.S.C. 371. On December 11, 1967, petitioner Dioguardi was sentenced to imprisonment for five years and fined $10,000; petitioner Plumeri was sentenced to imprisonment for three years; and petitioner First National Kosher Provisions, Inc. was fined $10,000. The court of appeals affirmed.

The evidence is set forth in the opinion below (*Dioguardi* Pet. App. A). Briefly, it showed that petitioners Dioguardi and Plumeri had important roles in the operation of Consumers Kosher Provisions, Inc., a company in serious financial difficulties. In August 1964, American Kosher Provisions, Inc., a competitor, agreed to purchase all of Consumers' stock and assume all of its obligations. It also agreed to take over its operations pending the closing date of the sale (Gov't. Ex. 1). Upon the basis of this agreement, the creditors of Consumers withheld the invocation of various creditors' remedies (Tr. 445). On the closing date, October 27, all of Consumers' stock was not produced and American refused to consummate the purchase (Tr. 447–449). On October 29, 1964, an inventory of Consumers' property was made and property valued at approximately $32,000 was returned to Consumers (Tr. 613–617). On the same date, Dioguardi and Plumeri went into business as First National Kosher Provisions, Inc., utilizing Consumers' inventory, its plant and its leased trucks. The financial statements of First National never indicated that it had utilized a portion of Consumers' inventory or that it owed and money to Consumers or its creditors and First National never paid Consumers for the use of its property. When an accountant employed by First National noted that its profits were much too high, Dioguardi and Plumeri advised him that $5,523 of Consumers' inventory had been utilized by the company (Tr. 1017–1030, 1040–1045; Gov't. Ex. 29).

On January 25, 1965, three creditors filed a petition in bankruptcy against Consumers and eight days later it was adjudicated a bankrupt (Gov't. Exs. 22, 37). In March 1965, a trustee in bankruptcy was appointed (Tr. 1179–1180). At no time was this trustee informed that the inventory of Consumers had been transferred to First National and had been utilized by it (Tr. 1183, 1190).[1]

ARGUMENT:

1. A government witness calculated First National's purchases, sales and inventory from the date it commenced business (October 29, 1964) through the first month of its operations (Tr. 1304–1325). A second government witness who had supervised a computer tabulation then testified that, according to the tabulation, November 5 was the date when First National would have exhausted Consumers' inventory (Tr. 1437, 1438). Thereafter, the district court denied a defense request to require the government to produce the computer program, the electronic instructions given the computer to prepare the tabulations. The court of appeals pointed out (Dioguardi Pet. A12–13):

> The instruction here given the computer must have been one of utmost simplicity, as defense counsel must have realized—to start with the opening inventory, sum up the purchases and

[1] In the interval between the adjudication in bankruptcy and the appointment of the trustee, the petitioners moved First National from the old Consumers plant to another location and took some of Consumers' fixtures and equipment with them (Tr. 1173–1176).

> sales for each day, subtract the latter from the opening inventory, and repeat the process until the opening inventory was exhausted—in this case six times. Moreover, and more important, the data were so limited that defense counsel could easily have checked the correctness of the computer's performance by adding machine or even manually, as the Government had itself done in one instance * * *. Even now, two and a half years after the trial, we are pointed to no error in the computer's calculations. * * *

In these circumstances, as the court below concluded, there was no prejudicial error in failing to turn over the computer program to the defense. Nor is there any broad issue raised as to the circumstances under which a computer may be used as part of the process to determine guilt in a criminal case.

2. On recross-examination, government witness Sol Alpert falsely denied that he had spoken to the prosecution about the case during the luncheon recess (Tr. 559–560). Following a short redirect examination (Tr. 570–576), the prosecutors disclosed their conversation with the witness to the court and defense counsel (Tr. 577–578). As the court below points out in detail (*Dioguardi* Pet. App. A6–A8), when the defense refused to take a position about how the trial judge should advise the jury about the false denial, the trial court properly permitted the prosecution to reveal the details of the conversations (Tr. 577–586).

3. Petitioner Plumeri testified extensively on direct examination (Tr. 2197–2375, 2507–2642). Near the end of his direct examination, his counsel formulated a lengthy statement based on the language in the conspiracy count and asked, "Did you do that?" (Tr. 2638–2640). The court concluded that such a question was unnecessary since Plumeri had pleaded not guilty. It refused to permit an answer to that question. The claim that this ruling in some manner disparaged the extensive testimony of Plumeri lacks merit. The trial judge permitted Plumeri to answer a series of six shorter questions based on the language of the indictment (Tr. 2640–2642).

The court did not err in instructing the jury to consider Plumeri's testimony in light of his interest in the outcome of the case. Such instructions have been repeatedly upheld. See, *e.g.*, *Taylor* v. *United States*, 390 F. 2d 278, 284–285 (C.A. 8).

4. The indictment identified petitioner Dioguardi as "John Dioguardi, a/k/a Johnny Dio." The claim that the trial judge erred in not striking the name "Johnny Dio" from the indictment is fully answered by the opinion below. As there noted, the defense itself caused the Dio name to be brought before the jurors. There is no substance to the contention that petitioners were denied a fair trial by the references to this name during the trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JULY 1970.